



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Learning Group Corporation

File: B-236728

Date: December 29, 1989

DIGEST

1. Protest is denied where record fails to support protester's contention that it was misled during discussions into increasing its price. Record shows that price increase was due to protester's more than doubling its overhead rate after discussions during which agency specifically accepted lower overhead rate initially proposed.

2. Protest that agency should make award on the basis of initial proposals since protester's initial proposal was lower in price than the awardee's best and final offer (BAFO) price submitted after discussions were held is denied. Federal Acquisition Regulation provides that where discussions have been held award should be made on the basis of BAFOs.

DECISION

The Learning Group Corporation protests the award of a contract to Environmental Management Support, Inc. under request for proposals No. DTFH61-89-R-0056 issued by the Federal Highway Administration for the development of educational and technical assistance materials to increase awareness and understanding of Federal Motor Carrier Safety Regulations, Hazardous Material Regulations and related technological advances. The Learning Group contends that it was misled by the agency during negotiations and that award should have been made to it on the basis of initial proposals.

We deny the protest.

The RFP was issued on February 27, 1989 as a total small business set-aside and contemplated the award of an indefinite quantity fixed-price labor hour contract. It provided that the principal basis for award would be

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technical factors. However, price was to be considered in the ultimate award decision. Only technical factors were point-scored.

The agency received seven proposals by the March 29 closing. As the result of the evaluation of initial proposals, four, including the protester's, were determined to be in the competitive range. The Learning Group received an initial technical score of 86, the second highest, and the agency determined that it offered an average hourly labor rate of \$35.42. Environmental Management received the next highest score of 83.5 and proposed an average rate of \$37.56. The technical scores remained unchanged as a result of best and final offers (BAFOs); however, the protester revised its rates upward to an average of \$46.39 while the awardee lowered its rates to an average of \$34.87. The agency determined that Environmental Management's slightly lower technical score was offset by its proposed average rate, which was the lowest of all those proposed by offerors in the competitive range, and made award to that firm on July 28.

The Learning Group contends that it should have received the award based on its higher technical score and its price which was originally lower than the awardee's. The protester asserts that during negotiations agency personnel misled it by indicating that in its price proposal it should increase its employee benefits and overhead rates. Specifically, the protester states that it increased its original employee benefit rate from 22 percent to 23.15 percent and its overhead rate from 68 percent to 151.36 percent which caused its overall average labor rate to exceed that of the awardee. The average labor rate which was used to compare offeror's prices was comprised of the direct labor cost, and among other things, overhead, general and administrative (G&A) expenses and employee benefits.

The agency responds that it never dictated any particular overhead, benefit or G&A rates to the protester. It also states that it never suggested that The Learning Group's overhead be increased and in negotiations specifically accepted the 68 percent rate originally proposed.

From the record it appears that the increase in the protester's price was due almost entirely to its increasing its overhead rate. The agency's written negotiation summary shows that while the agency questioned the Learning Group's G&A and employee benefit rates it made no recommendation to the protester concerning its overhead rate and simply accepted the rate as initially proposed. According to both the protester and the agency, after negotiations the

Learning Group asked to see the rates used by the agency in conducting its cost analysis. The agency first agreed to provide the protester with the calculations for employee benefits and G&A but not for overhead. The protester again requested the calculations for all three rates which the agency eventually provided. Those calculations, which were created by a consultant used by the agency to conduct the cost analysis, showed an overhead of 151.36 percent applied to the protester's direct labor costs.

It appears that the protester reviewed the consultant's cost analysis and adopted its figures in its BAFO. In fact its BAFO stated: "Based on our analysis of . . . figures, TLG agrees with and has applied them to our direct costs." While the protester does not make the basis of its position entirely clear it seems to argue that since the agency negotiator suggested that it alter its employee benefit and G&A rates based on the consultant's analysis the protester also had to raise its overhead rate in accordance with the consultant's figures.

We do not agree. First, it is clear that the agency negotiator did not object to the Learning Group's original proposed overhead rate of 68 percent. Nor is there any indication that the agency told the protester that it should follow the consultant's analysis concerning overhead. Further, we simply do not understand the protester's position that it was somehow forced to use the higher overhead rate because the agency allegedly suggested that it change the base upon which its G&A and employee benefit rates were calculated. There is no requirement that we are aware of, and the protester cites none, that each of these rates be calculated using the same base.

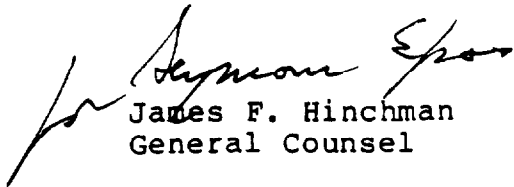
We think the protester was free to use a different base for the calculation of overhead, or to use any percentage it thought appropriate and therefore was not compelled to raise the rate based on the agency's suggested changes to employee benefits and G&A rates. Since the Learning Group has advanced no other reason for its subsequent dramatic increase to its overhead rate, we find no support for its argument that it was misled into raising its price by the agency during discussions.

The protester also contends that the agency should have made award on the basis of initial proposals. The Learning Group essentially argues that since its initial price was lower than the awardee's final price, the agency should make award to the Learning Group based on its initial price.

Once discussions have been held and BAFOs requested, an agency is required to make award based on the BAFOs. It cannot choose to reverse itself and to make award on the basis of the initial proposals. See Federal Acquisition Regulation § 15.611(d).

Moreover, by submitting its BAFO, the protester amended its original proposal so that the original proposal no longer constituted an independent offer.

The protest is denied.


James F. Hinchman
General Counsel